

STATE OF MICHIGAN
COURT OF APPEALS

DEPARTMENT OF ENVIRONMENTAL
QUALITY,

UNPUBLISHED
July 20, 2010

Plaintiff-Appellant,

v

JOSEPH R. BROWN,

No. 291419
Ingham Circuit Court
LC No. 08-001466-CE

Defendant-Appellee.

Before: TALBOT, P.J., and FITZGERALD and DAVIS, JJ.

PER CURIAM.

Plaintiff, Department of Environmental Quality (DEQ), appeals as of right the order granting summary disposition pursuant to MCR 2.116(C)(7) (claim barred by res judicata or equitable estoppel) in favor of defendant, Joseph R. Brown, an Indiana well drilling contractor who operated a well drilling business in Michigan, in this action in which the DEQ sought injunctive relief to compel defendant to comply with correction orders issued by the DEQ and various county health departments. We reverse.

FACTS AND PROCEDURAL HISTORY

Defendant had drilled wells in Michigan pursuant to a Certificate of Registration issued by the DEQ under the authority of Part 127 of the Public Health Code (PHC), MCL 333.12701 *et seq.* In May 2007, the Barry County Health Department issued five correction orders under MCL 333.12709(1), each asserting that defendant failed to comply with statutory and regulatory requirements, and ordering defendant to take certain corrective actions.¹ Based on the alleged deficiencies identified in the correction orders, as well as additional alleged violations, on June 12, 2007, the DEQ sent a “Notice of Intent to Revoke Certificate of Registration, Deny Renewal of Certificate of Registration, and Notice of Informal Opportunity to Show Compliance with Statutory and Regulatory Requirement” under MCL 333.12709(2). An addendum dated July 5, 2007, was also sent, asserting violations at another well site.

¹ Such corrective actions were either not taken, or were unsatisfactory.

Defendant was provided an informal opportunity under MCL 24.292 to show compliance with the applicable statutory and regulatory requirements or to negotiate enforceable correction actions. The matters raised by the June 12 notice and July 5 addendum were not resolved at the conference. Consequently, the DEQ issued a Notice of Suspension pursuant to MCL 333.12709(2) on July 24, 2007. Defendant filed a verified complaint and an ex parte motion for a temporary restraining order (TRO) and preliminary injunction on August 3, 2007, seeking to enjoin the suspension of his certificate of registration. The DEQ did not object to the issuance of the TRO pending defendant's filing of a petition with the DEQ for a contested case proceeding pursuant to MCL 333.12709(2) regarding the suspension.

Subsequent notices of violation and orders to correct deficiencies in the construction of additional water wells were sent to defendant between November 29, 2007, and December 14, 2007. On February 11, 2008, the trial court entered a "Stipulation and Order to Consolidate the Allegations with Pending Petition." As a result, all of the alleged violations set forth in the revocation notices through December 14, 2007, were set forth in the contested case proceeding regarding the suspension of defendant's certificate.²

Before commencement of the contested case hearing, defendant agreed to voluntarily forfeit his certificate of registration. A document signed on April 7, 2008, entitled "Voluntary Forfeiture of Water Well Drilling Contractor Certificate of Registration," provided in pertinent part:

THIS MATTER PERTAINS TO RESOLUTION of the administrative action which was initiated through the issuance of the Notice of Intent to Revoke Certificate of Registration, Deny Renewal of Certificate of Registration, and Notice of Informal Opportunity to Show Compliance With Statutory and Regulatory Requirements (Notice of Intent), to Joseph R. Brown, Water Well Drilling Contractor Certificate of Registration Number 91-817, d.b.a. Joe Brown Drilling Contractor, dated June 12, 2007, the Addendum to the Notice of Intent dated July 5, 2007, and the Notice of Intent dated December 14, 2007, by the Michigan Department of Environmental Quality (MDEQ), Water Bureau.

Mr. Joseph R. Brown hereby voluntarily forfeits and relinquishes to the State of Michigan, Water Well Drilling Contractor Certificate of Registration (Certificate) Number 91-1817, including all property rights associated with the Certificate. Mr. Joseph R. Brown agrees to return the following materials to the MDEQ within 10 days after signing this document:

The document also stated that defendant acknowledged that he would not pursue future registration as a water well drilling contractor or pump installer in the state of Michigan, and that

² The DEQ subsequently inspected all of the wells that defendant had drilled in Michigan and issued a fourth "Notice of Intent to Revoke the Certificate" and another "Notice of Violation and Order to Correct" on February 25, 2008. The correction notice ordered defendant to complete the specified corrective actions by April 15, 2008.

defendant elected not to challenge the allegations in the notices of intent and relinquished all rights to a contested case hearing on the matter. The circuit court entered an order dismissing defendant's verified complaint on April 30, 2008, indicating that the action "which has been held in abeyance pending the outcome of a contested case hearing in the related administrative matter, is hereby dismissed with prejudice."

The DEQ filed the present action on November 8, 2008, seeking a declaration that defendant's past conduct violated Part 127 of the PHC and its rules, and seeking an order compelling defendant to comply with the correction orders issued between May 2007 and February 25, 2008, to hire a Michigan registered well drilling contractor "for the purpose of correcting all well deficiencies identified . . ." and to prohibit defendant from "charging well owners any expenses associated with performing the corrections or site restoration to original condition."

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(7), seeking dismissal of the entire complaint on the grounds of res judicata and equitable estoppel. Defendant maintained that the only remedy the DEQ had to compel defendant to comply with the correction orders was the administrative process that led to forfeiture of his certificate of registration. In response, the DEQ asserted that the complaint in the present case was based upon § 12709(1), which establishes a procedure to issue correction orders and is a separate and distinct procedure from the procedure relating to the suspension proceeding set forth in § 12709(2), which was resolved by defendant's forfeiture of his certificate. The DEQ maintained that the correction orders were a separate and distinct proceeding from the suspension proceeding, and that the DEQ had no independent authority to compel complaint with its correction orders and that § 12709(1) does not provide such authority. Rather, the DEQ maintained that the PHC established an enforcement mechanism for correction orders in MCL 333.2255, which provides the DEQ with the authority to seek injunctive relief in the circuit court to compel compliance with the correction orders. The DEQ maintained that defendant's attempt to avoid responsibility for the correction orders by voluntarily forfeiting his certificate of registration was contrary to the protection of the public health that the PHC was designed to promote.

Following a hearing, the trial court issued an opinion and order granting summary disposition pursuant to MCR 2.116(C)(7) in favor of defendant. The trial court reasoned in part as follows:

MDEQ issued a Suspension of Defendant's license pursuant to Section 12709(2) of the Public Health Code on July 24, 2007. Defendant obtained a temporary restraining order from Ingham County Circuit Court and petitioned for an administrative contested case proceeding to challenge the suspension. MDEQ sought and obtained relief for the wells upon which it had issued Correction Notices to Defendant. At the proceeding, MDEQ and Defendant entered into a consent judgment where Defendant was to forfeit his well drilling license. MDEQ chose not to raise the issue of whether Defendant should be required to hire other well drillers to fix the wells in question. This Court holds that the administrative proceeding was an appropriate forum for MDEQ to seek compliance of the Correction Orders they had issued. This Court also finds: (1) the prior action was decided on the merits through a consent judgment; (2) the

issues raised in the case might have been raised and resolved in the first case; and (3) both actions involved the same parties. Therefore, the doctrine of res judicata bars the claims made by MDEQ in this case.

I. RES JUDICATA

The DEQ argues that it is not barred by res judicata from enforcing correction orders issued pursuant to MCL 333.12709(1) in circuit court. It maintains that it cannot enforce its own correction orders in an administrative suspension proceeding under MCL 333.12709(2), and that it is statutorily authorized to enforce its correction orders in circuit court.

Applications of res judicata, as well as decisions on motions for summary disposition, are reviewed de novo as questions of law. *Wayne Co v Detroit*, 233 Mich App 275, 277; 590 NW2d 619 (1998). Similarly, issues of statutory construction are also reviewed de novo. *Halloran v Bhan*, 470 Mich 572, 576; 683 NW2d 129 (2004).

The DEQ and the Barry County and Tuscola County Health Departments issued correction orders to defendant, under the authority in MCL 333.12709(1), to correct violations of Part 127 of the PHC and the Part 127 Rules. MCL 333.12709(1) provides:

When the department or local health department determines that there are reasonable grounds to believe there has been a violation of sections 12701 to 12715 or a rule or the construction code promulgated under section 12714, the department or the local health department shall investigate the violation. If the department or local health department establishes that a violation has been committed, the department or the local health department shall order the responsible person to make the proper corrections.

MCL 333.12709(1) does not provide an administrative challenge to correction orders. Thus, a defendant is required to initiate the challenge pursuant to MCR 7.104(A), which refers to MCR 7.101 and requires an appeal within 21 days of the issuance of a correction order. MCR 7.101(B)(1)(a). Defendant never appealed the correction orders and did not comply with them.

The DEQ also initiated a separate proceeding pursuant to MCL 333.12709(2) to suspend defendant's certificate of registration. MCL 333.12709(2) provides:

When the department finds that the holder of a certificate of registration has engaged in a practice in violation of sections 12701 to 12715 or a rule, construction code, or order issued pursuant to those sections, the department may give written notice to the holder of the certificate of registration that the certificate of registration is suspended. A person who receives notice from the department that his or her certificate of registration is suspended, upon request, shall be granted a hearing before the department or an authorized representative of the department. If a petition for a hearing is not filed within 30 days after the day on which the certificate of registration was suspended, the certificate of registration is automatically revoked.

The suspension proceeding under MCL 333.12709(2) resulted in defendant's filing of a petition for a hearing, and culminated in defendant's voluntary forfeiture of his certificate of registration.

At issue is the interplay between MCL 333.12709(1) and (2). The statutory language of MCL 333.12709(1) authorizes the issuance of correction orders, and MCL 333.12709(2) authorizes the initiation of a suspension proceeding when a party has violated Part 127 of the PHC or the Part 127 Rules. Part 127 therefore provides two separate and distinct procedures to address violations of Part 127 of the PHC. MCL 333.12709(1) is designed to address the correction of improperly constructed wells, whereas MCL 333.12709(2) is designed to suspend the authority of a person who violates Part 127 of the PHC to construct those wells. The trial court concluded that the same well construction deficiencies supported both the correction orders and the suspension proceeding and, therefore, the DEQ was required to seek enforcement of the correction orders as part of the suspension proceeding.

“Under the doctrine of res judicata, ‘a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.’” *Wayne Co*, 233 Mich App at 277, quoting Black's Law Dictionary (6th ed, 1990), p 1305. “The doctrine operates where the earlier and subsequent actions involve the same parties or their privies, the matters of dispute could or should have been resolved in the earlier adjudication, and the earlier controversy was decided on its merits.” *Id*.

While the DEQ has authority under MCL 333.12709(2) to suspend a certificate of registration of a defendant who does not file a petition for hearing, it does not have authority under MCL 333.12709(1) to enforce its own correction orders.³ In order to enforce its correction orders, the DEQ must look to the authority under which it operates as set forth in the PHC, 1978 PA 368. The authority to enforce correction orders is set forth in MCL 333.2255, which provides:

³ Unlike MCL 333.12709(2), MCL 333.12709(1) does not provide an administrative challenge to correction orders issued pursuant to this statutory section. Appeals from state agency decisions are governed by MCL 600.631, which provides:

An appeal shall lie from any order, decision, or opinion of any state board, commission, or agency, authorized under the laws of this state to promulgate rules from which an appeal or other judicial review has not otherwise been provided for by law, to the circuit court of the county of which the appellant is a resident or to the circuit court of Ingham County . . .

Pursuant to MCR 7.104(A), “An appeal in the circuit court under MCL 600.631 is governed by MCR 7.101 and 7.103 . . .” MCR 7.101 requires an appeal within 21 days of the issuance of the correction order. MCR 7.101(B)(1)(a). Defendant has never filed an appeal of the correction orders, nor did he comply with them.

Notwithstanding the existence and pursuit of any other remedy, the department, without posting bond, may maintain injunctive action in the name of the people of this state to restrain, prevent, or correct a violation of a law, rule, or order which the department has the duty to enforce or to restrain, prevent, or correct an activity or condition which the department believes adversely affects the public health.

Thus, the DEQ had the authority under MCL 333.2255 to maintain an injunctive action in circuit court with regard to the correction orders regardless of any action taken to suspend defendant's certificate of registration. The mere fact that the suspension proceeding under MCL 333.12709(2) was premised on the rule violations that also formed the basis of the correction orders does not give an administrative agency authority to enforce the correction orders. Because the DEQ could not resolve the correction orders as part of the suspension proceeding, the elements of res judicata were not established.⁴

II. EQUITABLE ESTOPPEL

The DEQ also maintains that the trial court's dismissal of the DEQ's complaint on the alternative basis of equitable estoppel was erroneous because no evidence supported the trial court's finding that defendant "detrimentally relied on MDEQ's acceptance of his offer to forfeit his license in order to conclude the proceedings against him." The DEQ also maintains that the trial court cited no authority in support of its finding that the suspension proceeding "took away MDEQ's ability to seek injunctive relief because Defendant can no longer fix the wells."

For equitable estoppel to apply, defendant must establish that the DEQ's acts or representation induced him to believe that (1) the DEQ would not seek to enforce the corrections orders, (2) he justifiably relied on this belief, and (3) that he was prejudiced as a result of his reliance on the belief that the corrections orders would not be enforced. *AFSCME Int'l Union v Bank One*, 267 Mich App 281, 293; 705 NW2d 355 (2005). Here, there is no evidence that defendant had a belief that the correction orders would not be enforced. Defendant's belief as to the enforceability of the correction orders was not mentioned in the evidence that was presented. No evidence was presented to support a finding that the DEQ induced defendant to voluntarily forfeit his certificate of registration in the administrative suspension proceeding by agreeing to abstain from enforcement of its corrections orders.⁵ This defense does not apply in this case because defendant cannot establish the first prong of the above-described test. Hence, the trial

⁴ We reject defendant's suggestion that the DEQ could have filed a counterclaim with regard to enforcement of the correction orders when defendant filed an action in circuit court seeking a temporary restraining order against the suspension of his certificate of registration. Thus, dismissal of that action "with prejudice" following defendant's voluntary forfeiture of his certificate of registration does not bar the present action on principles of res judicata.

⁵ Indeed, the "Voluntary Forfeiture of Water Well Drilling Contractor Certificate of Registration" states that "This matter pertains to resolution of the administrative action which was initiated through the issuance of the Notice of Intent to Revoke Certificate of Registration . . ." No mention is made of the corrections orders.

court's decision was incorrect to the extent that it provided that equitable estoppel existed in this case.⁶

Reversed and remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Alton T. Davis

⁶ The fact that defendant can no longer make the corrections himself is not relevant to the issues.